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No. 95-630

In the Supreme Court of the United States

OCTOBER TERM, 1995

FRANK L. BAIRD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Double Jeopardy Clause requires dismissal of a pending indictment that charges petitioner with drug and firearm offenses, because of the uncontested administrative forfeiture of $2,582 that was seized from petitioner's residence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 63 F.3d 1213.

JURISDICTION

The judgment of the court of appeals was entered on August 11, 1995. A petition for rehearing was denied on September 12, 1995. The petition for a writ of certiorari was filed on October 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner in

nine counts with narcotics and firearms offenses.[1] Before trial, petitioner moved to dismiss the indictment on the ground that his conviction and sentencing on the offenses it charges would violate the Double Jeopardy Clause. The district court denied the motion, and petitioner took an interlocutory appeal. The court of appeals affirmed. Pet. App. 1a-32a.

1. On April 20, 1994, Drug Enforcement Administration (DEA) agents and local law enforcement officers executing a search warrant at petitioner's residence in Bryn Mawr, Pennsylvania, discovered a clandestine laboratory for the manufacture of 3,4 methylenedioxy-methamphetamine, a Schedule I hallucinogenic controlled substance sold on the street as "Ecstacy." The officers also discovered precursor chemicals, formulae for the manufacture of the drug, and more than 30 kilograms of "Ecstacy." Pet. App. 2a; Gov't C.A. Br. 5-6. In addition, the agents seized

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[1] Petitioner is charged with conspiracy to manufacture and distribute 3,4 methylenedioxy-methamphetamine or "Ecstacy" (a schedule I narcotic), in violation of 21 U.S.C. 846; one count of attempting to manufacture "Ecstacy," also in violation of 21 U.S.C. 846; one count of manufacturing "Ecstacy" and one count of possessing "Ecstacy" with the intent to distribute it, each in violation of 21 U.S.C. 841(a)(1); possession of "Ecstacy" with the intent to distribute it within 1,000 feet of a school, in violation of 21 U.S.C. 860 (Supp. V 1993); creating a substantial risk of harm to human life while attempting to manufacture and manufacturing "Ecstacy," in violation of 21 U.S.C. 858; maintaining a place for the manufacture of "Ecstacy," in violation of 21 U.S.C. 856; attempted manufacture of amphetamine, in violation of 21 U.S.C. 846; and carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1) (Supp. V 1993).

$2,582 in cash that they found in petitioner's bedroom. Pet. App. 2a.

On May 27, 1994, the DEA sent petitioner a notice stating that the DEA sought the administrative forfeiture of the $2,582 seized from petitioner's residence. The notice stated that the cash and property were subject to forfeiture because they were "used or acquired as a result of a drug-related offense." The notice further stated that a claimant "may petition the DEA for the return of the property or [the claimant's] interest in it * * * and/or * * * may contest the seizure and forfeiture of the property." The notice explained the procedure for filing a claim or a petition for remission of the forfeiture and stated, in underscored words, that a "claim of ownership" to the property must be filed within 20 days of the date when the notice was first published in a newspaper of general circulation. See C.A. App. 13-15; see also Pet. App. 9a-10a.

Petitioner failed to file a claim to the seized cash. Because no claim to the property was made, on July 15, 1994, the DEA issued an administrative declaration of forfeiture for the currency. Gov't C.A. Br. 7.

2. Before the trial of the criminal charges against petitioner, he moved to dismiss the indictment. Petitioner contended that the administrative forfeiture already had "punished" him for the offenses charged in the indictment, and that the multiple punishments prong of the Double Jeopardy Clause accordingly barred his criminal conviction and sentence on those offenses. The district court denied the motion. Pet. App. 33a. The court held that "jeopardy [did] not attach[] pursuant to the administrative forfeiture proceeding." *Ibid.*

3. Petitioner took an interlocutory appeal of the district court's order, and the court of appeals affirmed. Relying on *Witte* v. *United States*, 115 S. Ct. 2199 (1995), the court first held that it had jurisdiction to hear petitioner's interlocutory appeal. Pet. App. 4a n.4. Turning to the merits, the court held that the administrative forfeiture of property does not impose punishment on anyone, because the government may obtain forfeiture only when no claim is filed to the property. Pet. App. 10a-11a. The court explained:

> Without adopting a position on the matter, we can certainly understand how a court might conclude that *civil* forfeiture under 21 U.S.C. § 881(a)(6) of drug proceeds constitutes "punishment" for double jeopardy purposes. However, we cannot fathom how an *administrative* forfeiture, under section 881(a)(6), of *unclaimed* alleged drug proceeds could possibly be held to constitute "punishment" in relation to an individual's double jeopardy claim. * * * All property administratively forfeited is, as a matter of law, "ownerless" property, and the taking of ownerless property "punishes" no one.

Ibid. (citations omitted).

The court also concluded that the administrative forfeiture of property seized from petitioner did not place him in "jeopardy" within the meaning of the Double Jeopardy Clause. Pet. App. 11a. The court held that "jeopardy does not, and cannot, attach until one is made a *party* to a proceeding before a trier of fact having jurisdiction to try the question of guilt or innocence." *Id.* at 13a. Accordingly, because petitioner failed to file a claim when he received

notice of the administrative forfeiture, the court held that his conviction and sentencing on the offenses charged in the indictment would not violate the Double Jeopardy Clause. *Id.* at 13a-14a.

Judge Sarokin dissented. He argued that if petitioner could establish that he owned the forfeited cash, then the forfeiture might have imposed punishment on him, even though he had not participated in the administrative proceeding. Pet. App. 16a-32a.

ARGUMENT

Petitioner renews his contention (Pet. 6-18) that the multiple punishments prong of the Double Jeopardy Clause bars his conviction and sentencing on the offenses charged in the indictment because he was previously punished by the uncontested administrative forfeiture of the $2,582 seized from his residence. The court of appeals correctly rejected that contention, and its conclusion is in accord with the views of every court of appeals that has considered the question. Accordingly, no further review is warranted.

1. The Double Jeopardy Clause prohibits the imposition of multiple punishments for the same offense in separate proceedings. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). In *United States* v. *Halper*, 490 U.S. 435 (1989), this Court held that after imposition of a criminal punishment, the Clause's "multiple punishments" prohibition barred imposition of a civil penalty that was "so extreme and so divorced from the Government's damages and expenses as to constitute punishment." *Id.* at 442. Subsequently, in *Austin* v. *United States*, 113 S. Ct. 2801 (1993), the Court held that a forfeiture of certain property used to facilitate narcotics offenses, pursuant to 21 U.S.C. 881(a)(4) and

(7), constitutes "punishment" for purposes of the Excessive Fines Clause of the Eighth Amendment.

Relying on *Halper* and *Austin*, the Ninth Circuit has held that a civil forfeiture of drug proceeds under 21 U.S.C. 881(a)(6) invariably constitutes punishment for purposes of the multiple punishments prong of the Double Jeopardy Clause. See *United States* v. *$405,089.23*, 33 F.3d 1210 (9th Cir. 1994), petition for cert. pending, No. 95-346 (filed Aug. 28, 1995); but see *United States* v. *Salinas*, 65 F.3d 551 (6th Cir. 1995) (forfeiture of proceeds of drug trafficking is wholly remedial and accordingly it does not inflict "punishment"); *United States* v. *Tilley*, 18 F.3d 295 (5th Cir. 1994) (same), cert. denied, 115 S. Ct. 573 (1995). The Fifth and Sixth Circuits have held that the forfeiture of property used to facilitate the commission of a crime, under 21 U.S.C. 881(a)(7), constitutes punishment for that crime. See *United States* v. *Perez*, No. 94-60788 (5th Cir. Nov. 21, 1995); *United States* v. *Ursery*, 59 F.3d 568 (6th Cir. 1995), petition for cert. filed, No. 95-345 (filed Aug. 28, 1995).

Petitioner's claim rests on the premise that the uncontested administrative forfeiture of the $2,582 seized from his residence likewise constitutes punishment, apparently for all of the offenses alleged in the indictment that is pending against him. Even if correct, that claim is not properly before this Court, because the court of appeals lacked jurisdiction to consider it. In *Abney* v. *United States*, 431 U.S. 651 (1977), this Court held that pretrial orders rejecting claims of former jeopardy may be raised by a defendant in an interlocutory appeal when they assert the right not to be "twice put to *trial* for the same offense." *Id.* at 661. The Court suggested, however, that a pure multiple-punishments claim, such as

petitioner raises, would not be similarly appealable, since "that aspect of the right can be fully vindicated on an appeal following final judgment." *Id.* at 660.

The court of appeals believed that a different conclusion was warranted by this Court's decision in *Witte* v. *United States*, 115 S. Ct. 2199 (1995), which recognized that the Double Jeopardy Clause prohibits the government from "*attempting* a second time to punish criminally, for the same offense." *Id.* at 2204 (emphasis partially deleted). *Witte*, however, presented no question of appellate jurisdiction, because the district court had dismissed the indictment on double jeopardy grounds, see *id.* at 2203-2204, and the court of appeals accordingly had jurisdiction over the government's appeal under 18 U.S.C. 3731. For that reason, the passage on which the court below relied was addressed to whether the defendant's claim was premature, not whether it was appealable. The fact that a double jeopardy claim may be ripe for adjudication by a district court (as is true of many other pretrial claims a defendant may make, including suppression claims) does not mean that the court's refusal to honor the claim is immediately appealable on an interlocutory basis. Because the right not to be subject to impermissible multiple punishments can be completely vindicated on appeal from a conviction and sentence, the court of appeals erred in asserting appellate jurisdiction over petitioner's interlocutory appeal.[2]

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[2] The courts of appeals are divided over the issue of appealability. Compare *United States* v. *Ramirez-Burgos*, 44 F.3d 17, 18-19 (1st Cir. 1995) (finding no right of interlocutory appeal for multiple punishments claim), with Pet. App. 4a n.4 (finding right of appeal); *United States* v. *Perez*, No. 94-60788

2. In any event, petitioner's double jeopardy claim is unfounded. The uncontested administrative forfeiture in this case did not inflict "punishment" on petitioner. And because petitioner did not claim ownership of the cash in the administrative proceeding, he was not placed in "jeopardy" in that proceeding.

Every court of appeals that has considered the issue has held that an administrative forfeiture does not constitute "punishment" for double jeopardy purposes. See *United States* v. *Cretacci*, 62 F.3d 307 (9th Cir. 1995); *United States* v. *Arreola-Ramos*, 60 F.3d 188, 192 (5th Cir. 1995); *United States* v. *Torres*, 28 F.3d 1463, 1465 (7th Cir.), cert. denied, 115 S. Ct. 669 (1994). Like the court of appeals in this case, those courts have recognized that administrative procedures may be used only to obtain the forfeiture of unclaimed property.[3] Thus, when the government

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(5th Cir. Nov. 21, 1995) (same); *United States* v. *Chick*, 61 F.3d 682, 684-686 (9th Cir. 1995) (same).

[3] Under 21 U.S.C. 881(d), the provisions of the customs laws governing summary forfeiture may be used against property that is subject to forfeiture under the controlled substances laws. See also 21 C.F.R. 1316.74-1316.77. The applicable customs statutes, 19 U.S.C. 1602-1621 (1988 & Supp. V 1993), provide for the administrative forfeiture of specified categories of seized property if the government publishes notice of seizure and intention to forfeit the property. If no claim is filed, the agency has the authority to declare the property forfeited without a judicial adjudication. See 19 U.S.C. 1609; 21 C.F.R. 1316.77. If a proper claim and bond (or proof of indigence) is filed, the agency seeking forfeiture must transmit the matter to the appropriate United States Attorney's office to commence a judicial forfeiture action. See 19 U.S.C. 1608. To commence that action, the government files an *in rem* complaint against the property and publishes notice of the

gives notice that it intends to forfeit property, and the purported owner fails to take any step to establish his interest in the property, the government may consider the property abandoned or ownerless. As the Ninth Circuit has explained, "[j]ust as the seizure of abandoned property cannot be said to implicate the former owner's privacy rights, the forfeiture of abandoned property cannot be said to implicate the former owner's double jeopardy rights." *United States* v. *Cretacci*, 62 F.3d at 310-311 (citations omitted). See also *United States* v. *Arreola-Ramos*, 60 F.3d at 192 (because only unclaimed property may be administratively forfeited, administrative forfeiture "punishe[s] no one"); *United States* v. *Torres*, 28 F.3d at 1466 (administrative forfeiture does not impose punishment on a person who fails to establish an interest in the forfeited property).

Moreover, a person who fails to file a claim in response to a notice that the government will seek administrative forfeiture of property never becomes a party to any forfeiture proceeding. In the absence of either the imposition of punishment or some participation in a proceeding aimed at imposing punishment, a person has not been placed in "jeopardy" within the meaning of the Double Jeopardy Clause. See *United States* v. *Arreola-Ramos*, 60 F.3d at 192-193 ("As Arreola did not appear and contest the forfeiture, he was never in jeopardy"); *United States* v. *Torres*,

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forfeiture proceeding. Any person who wishes to contest the judicial forfeiture must file a claim and an answer to the complaint. See Rule C, Supplemental Rules for Certain Admiralty and Maritime Claims. In a judicial forfeiture, a claimant may challenge the government's right to obtain forfeiture and raise an innocent owner defense.

28 F.3d at 1465 ("As a non-party, Torres was not at risk in the forfeiture proceeding, and '[w]ithout risk of a determination of guilt, jeopardy does not attach'") (quoting *Serfass* v. *United States*, 420 U.S. 377, 391-392 (1975)). Petitioner's failure to file a claim therefore precludes a finding that he was in jeopardy or suffered punishment in the administrative forfeiture.

Indeed, petitioner's failure to file a claim also constitutes a waiver of any rights he might have had under the Double Jeopardy Clause. As this Court has held, "the Double Jeopardy Clause * * * does not relieve a defendant from the consequences of his voluntary choice." *United States* v. *Scott*, 437 U.S. 82, 98-99 (1978). When a defendant makes a deliberate choice "to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he was accused," he cannot claim that he suffered a violation of the Double Jeopardy Clause in subsequent proceedings. *Ibid.*; see *Ricketts* v. *Adamson*, 483 U.S. 1, 10-12 (1987). Moreover, as the Court reiterated in *Halper*, the Double Jeopardy Clause provides an "intrinsically personal" constitutional protection and thus a defendant must show that his rights under the Clause have been violated. *Halper*, 490 U.S. at 447. By declining to file a claim to the seized cash, petitioner avoided becoming a party to the administrative forfeiture. Thus, he cannot now claim that the administrative forfeiture resulted in a violation of his personal rights under the Double Jeopardy Clause.[4]

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[4] Even if petitioner had suffered punishment by the administrative forfeiture of the seized cash, he would not be entitled to dismissal of the indictment. The Double Jeopardy

3. There is no reason to hold this case pending the disposition of the government's petitions for certiorari in *United States* v. *Ursery*, No. 95-345, and *United States* v. *$405,089.23*, No. 95-346. In our petition in *$405,089.23*, we seek review of the Ninth Circuit's conclusion that civil judicial forfeiture of drug proceeds under 21 U.S.C. 881(a) (1988 & Supp. V 1993) invariably constitutes punishment under the Double Jeopardy Clause. Similarly, our petition in *Ursery* challenges the Sixth Circuit's holding that the forfeiture of property used to facilitate a crime always amounts to punishment for double jeopardy purposes. Both petitions argue that the forfeitures at issue do not necessarily constitute punishment, that parallel civil forfeiture and criminal proceedings are not separate proceedings for purposes of the multiple punishments prong of the Double Jeopardy Clause, and that civil forfeiture and the criminal offense on which it rests are not the "same offense" under the Double Jeopardy Clause.

Although this Court's acceptance of the government's arguments in the *Ursery* and *$405,089.23* petitions would provide additional grounds for rejecting petitioner's claims, a decision favorable to the respondents in those cases would not provide petitioner with a ground for relief. The Ninth Circuit, which has taken the most expansive view of the application of the Double Jeopardy Clause to civil forfeiture pro-

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Clause prohibits the imposition of multiple punishments only for the "same offense" and only in separate proceedings. See *Halper*, 490 U.S. at 450; see also *United States* v. *Dixon*, 113 S. Ct. 2849, 2856 (1993). Petitioner does not explain how the forfeiture of a relatively modest sum of money can constitute punishment for every offense in a nine-count indictment.

ceedings, has squarely rejected a claim identical to petitioner's, in an opinion written by the author of the Ninth Circuit's decision in *$405,089.23*. See *United States* v. *Cretacci*, *supra*. And the court of appeals in this case explicitly differentiated between civil forfeiture of drug proceeds under 21 U.S.C. 881(a)(6), of which it said that it could "certainly understand how a court might conclude that * * * [such forfeiture] constitutes 'punishment,'" and the uncontested administrative forfeiture involved here, which it could not "fathom" how a court could regard as punishment. Pet. App. 10a. Accordingly, if the Court grants certiorari in *Ursery* and *$405,089.23* and decides those cases adversely to the government, they will have no effect on the validity of the court of appeals' reasoning in this case.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1995

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[5] Moreover, in light of the court of appeals' error in asserting jurisdiction over this interlocutory appeal (see pages 6-7, *supra*), a remand to that court for further consideration of petitioner's claims would be especially inappropriate.